No. 15628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAM SNYDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdiction.

This appeal involves interest on a judgment for refund of taxes to the extent relating to income taxes for the calendar year 1943.

Appellant is an individual residing in Los Angeles, California. [R. 3, 9.] The income tax return involved was filed by him with the Collector of Internal Revenue for the Sixth District of California. [R. 13.]

On March 29, 1955, after remand by this court, 217 F. 2d 928, judgment was entered in appellant's favor for refund of a deficiency, together with interest thereon as provided by law. [R. 13.] On March 30, 1955, appellant filed with the Commissioner of Internal Revenue claim on form 843 for payment of said judgment. [R. 14.]

On December 6, 1955, a refund check was issued to appellant. [R. 7.] Interest was included in the amount of said check except that no interest was included on the first $7,419.14 of the refund ordered for 1943. [R. 8.]

On April 23, 1957, appellant filed suit for the said interest in the court below. [R. 8.] Jurisdiction was conferred on that court by 28 U. S. C., section 1346-(a)(2). On May 28, 1957, summary judgment was entered dismissing the complaint with prejudice and with costs for defendant. [R. 17.] Within sixty days thereafter and on June 12, 1957, appellant filed notice of appeal pursuant to 28 U. S. C., section 2107 and F. R. C. P., Rule 73(a). [R. 17.] Jurisdiction is conferred on this court by 28 U. S. C., section 1291.

Questions Presented.

1. Whether interest may be denied on an overpayment of tax ordered refunded by judgment, where there is collected out of the judgment an assessment for a prior year plus interest thereon up to the date of such collection.

2. Whether summary judgment is proper where the findings of fact do not cover material issues of fact contained in the pleadings and affidavits filed.

Statutes, Rules, and Regulations Involved.

The statutes, rules, and regulations involved in this proceeding are set forth in the Appendix, *infra*.

Statement.

This proceeding, involving interest on a judgment for refund of federal income taxes, is, like No. 15554 in this court, a sequel to *Snyder v. Westover,* No. 13643 in this court, decided December 20, 1954, and reported at 217 F. 2d 928.

The years involved there were 1943, 1944, 1945, and 1946, the amounts involved had been paid as deficiencies, and the question was whether a specified share of the income of a partnership, California Car Company, was the income of appellant's daughter, who reported it on her return, or the income of appellant.

The deficiencies had been assessed on March 23, 1948. Appellant paid the assessments in installments. In that manner he paid the assessments in full except for a balance of $7,419.14 which remained for the year 1945. He failed to pay that balance only because his funds were exhausted by the payments which he did make. [See R. 30 in No. 15554.] After claim for refund, suit, judgment, appeal to this court, remand, and amendment of judgment pursuant to remand, a judgment which became final was entered, on March 29, 1955. As to the year 1943 the said judgment ordered:

> "Refund of individual income taxes (inclusive of interest paid thereon) in the sum of $12,679.60, paid by plaintiff in respect to the year 1943, together with interest on said sum as provided by law as follows:
>
> On $1,700.00 from May 6, 1948;
> On $1,454.58 from August 9, 1948;
> On $1,700.00 from September 9, 1948;
> On $1,700.00 from October 8, 1948;
> On $1,700.00 from November 6, 1948;
> On $781.83 from December 6, 1948;
> On $1,700.00 from January 13, 1949;
> On $1,700.00 from February 14, 1949;
> On $243.19 from March 14, 1949." [R. 4, 9.]

The above amounts and dates correspond to the deficiency paid for 1943, in the installments paid and the

dates of their payment. Out of the refund so ordered appellee collected the said unpaid balance of $7,419.14 on the assessment for 1945, and also interest in the amount of $4,161.21 on that assessment from the date of the assessment, March 23, 1948, to Dec. 6, 1955. [R. 5, 9.] Appellee on December 6, 1955, issued a check to appellant for the balance of the refund ordered but refused to include in the check any interest on the first $7,419.14 of the amounts ordered refunded for 1943. [R. 5, 9.]

Appellee's reason was that, to the extent of $7,419.14, the amounts ordered refunded for 1943 were not actually refunded but were applied in payment of the unpaid balance of the assessment for 1945 and that, therefore, pursuant to section 3771(b)(1) of I. R. C. 1939, the said amounts, to the extent of $7,419.14, bore no interest after March 23, 1948, the date of the 1945 assessment. [R. 16.] In other words, appellee refused to allow any interest on the first $7,419.14 of the amounts for 1943 ordered refunded by the judgment; yet at the same time it collected out of said judgment on the very same amount of $7,419.14, as the unpaid balance of the assessment for 1945, interest in a total of $4,161.21 from March 15, 1948, to December 6, 1955. [R. 5, 9.]

This suit followed. Appellee in its answer admitted all of the allegations in the complaint. [R. 9.] It then filed a motion for summary judgment, supported by an affidavit. [R. 10.] The court granted the motion and appellee lodged proposed findings of fact, conclusions of law and judgment. Appellant filed objections on the ground that the findings proposed did not conform to the pleadings and affidavit filed. [R. 12.] The court nevertheless signed the findings of fact and conclusions of law as lodged and entered the judgment. [R. 12a-17.] This appeal followed.

Specifications of Error.

The court below erred as follows:

1. In denying to appellant interest as determined under the Judicial Code, on the refund ordered by judgment to the extent of an assessment collected therefrom.

2. In entering summary judgment denying such interest upon the basis of findings which do not cover material issues of fact contained in the pleadings and affidavits filed.

Summary of Argument.

I. R. C. 1939, section 3771, relating to interest in the case of overpayments of tax, distinguishes, in respect to the period for which interest is to be allowed, between overpayments credited against assessments and overpayments refunded. In the case of overpayments credited, interest is allowed, section 3771(b)(1), only up to the date of the assessment against which the credit is made.

Applying that section here the Commissioner refused interest on an overpayment for a period of more than seven years but collected out of that same overpayment not only the assessment but interest on the assessment for the same period.

Section 3771, however, applies only to overpayments determined by the Commissioner and not to those denied by the Commissioner but determined by a court. In the latter case, the Internal Revenue Code itself, I. R. C. 1939, section 3773, expressly requires that the interest be determined under the provisions of the Judicial Code. Under those provisions interest must be allowed up to the date of the refund check.

The power of the government to collect an unpaid assessment out of a judgment for refund is not involved here. Such collection may be made in any case under the distraint provision of the Internal Revenue Code, I. R. C. 1954, section 6331. It may also be made under the offset provision of the statute relating to debts due by or to the United States, 31 U. S. C., sec. 127. Under such provisions the mechanics of refund would be the same except that the refund check would be issued by the Treasury Department to the division of government to which the debt is due instead of to the taxpayer.

Application of the provision of the Internal Revenue Code relating to credit of overpayments would also be a collateral attack upon the judgment here which does not order a credit but instead expressly orders a refund.

The summary judgment here is also improper because the findings upon which it is based omit a material fact and otherwise distort the facts as shown in the pleadings and affidavits.

ARGUMENT.

I.

Under the Express Terms of the Revenue Statute, I. R. C. 1939, Section 3773, Interest Here Must Be Computed Under the Provisions of the Judicial Code, and Under Those Provisions It Is Mandatory That Interest Be Allowed in the Case of a Judgment for Refund.

Sections 3770 to 3773 of the Internal Revenue Code of 1939 are entitled as follows:

Sec. 3770. Authority to make abatements, credits and refunds.

Sec. 3771. Interest on overpayments.

Sec. 3772. Suits for refund.

Sec. 3773. Interest on judgments.

Of section 3771, subsection (b), covering the interest period, treats credits and refunds separately. Under subsection (b)(1), in the case of a credit against an assessment interest is allowed on the amount so credited to the date of the assessment. Under subsection (b)(2), in the case of a refund interest is allowed to a date preceding the date of the refund check by not more than 30 days.

In section 3773, the term "Interest on Judgments" means interest, not on the judgment itself, but on the overpayments included in the judgment. (*Mellon v. United States, ex. rel. Orono Pulp & Paper Co.* (App. D. C.), 50 F. 2d 1007, 1007-1008.)

Of the above sections, section 3770 authorizes *the Commissioner* to make refunds. Section 3773, which, as shown above, follows the section relating to *suits* for refund, provides as follows:

> "For interest on judgments, see section 177 of the Judicial Code as amended by act of May 29, 1928, c. 852, sec. 615, 45 Stat. 877 (U. S. C., Title 28, sec. 284)."

Of section 177 of the Judicial Code there referred to, subsection (a) relates only to the Court of Claims, and subsection (b), relating generally to internal revenue taxes, is now *verbatim* section 2411(a) of the Judicial Code. (H. R. 352, U. S. C. Congressional Service 1949, Vol. 2, at p. 1273.) Indeed, in section 6612(a) of the Internal Revenue Code of 1954, which continues section 3773 of the Internal Revenue Code of 1939, "177" is simply replaced by "2411(a)."

Thus the Internal Revenue Code itself makes applicable in the case of judgments, section 2411(a) of the Judicial Code. Pursuant to that section, in the case of a judgment for a refund, interest is mandatory. That section requires that, "In any judgment of any court rendered . . . for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days."

To the same effect, Sol. Op. 143, I-2 C. B. 261, an Internal Revenue ruling, where it is stated, at page 266:

> "Where suit is instituted against a collector of internal revenue for the recovery of taxes alleged

to have been erroneously or illegally collected, interest may be allowed by the court *in* the judgment, and when so allowed must be refunded with the tax." (Italics in original.)

Likewise, in *Mellon, et al. v. United States, ex rel. Hiss* (App. D. C.), 36 F. 2d 609, it was held that for determination of interest in case of a suit for refund of internal revenue taxes section 177(b) of the Judicial Code was exclusive.

It follows that in this case, under the express terms of the statute, interest must be determined under section 2411(a) of the Judicial Code and cannot be determined under any other provision of law.

II.

Section 3771 of I. R. C. 1939, of Which Subsection (b)(1) Provides the Interest Period in the Case of Credit of Overpayments, Applies Only to an Overpayment Determined by the Commissioner and Not to One Determined by a Court.

It may be observed first, in regard to section 3771 of I. R. C. 1939, that the preceding section, section 3770, authorizes *the Commissioner* to make refunds of overpayments. Consistently, it has been expressly held that the term "overpayment" as used in section 3771 means only an overpayment *determined by the Commissioner.*

In *Bonwit Teller & Co. v. United States* (Ct. Cls.), 52 F. 2d 904, after remand by the Supreme Court in 283 U. S. 258, 51 S. Ct. 395, there was involved section 1116 of the Revenue Act of 1926, which, with amendment not here pertinent by the Revenue Act of 1928, became section 3771 in I. R. C. 1939. The court there

refused to apply section 1116 of the Revenue Act of 1926, but applied section 177(b) of the Judicial Code, expressly because the refund was allowed, not by the Commissioner, but by the court. The court there, rejecting the contention that section 1116 of the Revenue Act of 1926 was applicable, stated, at pages 905-906:

> "If this were a suit only for interest on a tax which the Commissioner had refunded, this contention would be correct. But here the Commissioner refused to refund the tax which had been erroneously and illegally collected, and also refused to pay any interest thereon."

Again, in *Standard Oil Co. v. United States* (Ct. Cls.), 5 F. Supp. 976, it was held that that section of the revenue act, insofar as it related to credit of an overpayment against a deficiency, applied only to "cases where both deficiencies and overpayments have been found by the *Commissioner,* and the final determination of the overpayment or deficiency as the case might be was only a matter of a *few weeks* at most." (Italics added.)

Likewise, in *Pan American World Airways, Inc. v. United States,* 119 F. Supp. 144 (S. D., N. Y., 1953), it was held that the statutory sections express "a carefully integrated program providing for interest, fully protecting both the government and the taxpayer," and permitting "the taxpayer to settle his tax liability and the government to get its money without delay *where no controversy remains between the taxpayer and the Commissioner.*" (Italics added.)

This difference in treatment of interest as between overpayments allowed by the Commissioner, on the one hand, and judgments, on the other hand, is emphasized

by their completely separate treatment in every enactment of revenue law. Thus in the Revenue Act of 1926, section 1116 covered "Interest on Refunds and Credits," while section 1117, entitled "Interest on Judgments," amended the Judicial Code in respect to interest included in judgments. In the Revenue Act of 1928 the corresponding sections are 614 and 615. In I. R. C. 1939, which followed, the corresponding sections are 3771 and 3773; and in I. R. C. 1954, they are sections 6611 and 6612(a). Throughout the entire history of the federal revenue law interest in the case of judgments has been treated entirely separately from interest in the case of overpayments allowed by the Commissioner.

It is clear from that history and the cases cited that section 3771 has no application to a *judgment,* where the determination is made by a court and not by the Commissioner. In that case the interest must be determined under the Judicial Code, as required by section 3773.

III.

It Was Not the Intent of Congress to Charge a Taxpayer With Interest on an Assessment for a Period of Seven Years but to Deny Him Any Interest for the Same Period on an Overpayment for a Prior Year Offset Against the Assessment.

The reason for the separate treatment of interest in the case of judgments is especially clear here, where the judgment was entered, not a few weeks after the assessment collected out of it, but more than *seven years* thereafter. If section 3771(b)(1) is applied here, as appellee has done, interest is collected on the 1945 assessment for the entire seven-and-a-half year period from March 23, 1948, to December 6, 1955, but no interest is allowed for

the same period on the overpayment for 1943 out of which that very assessment is collected.

The principle involved in the credit of an overpayment determined by the Commissioner is clearly carried through to appellant's position in *The New River Company v. United States* (Ct. Cls.), 30 F. Supp. 239, as follows:

> "The gist of our decision in *Standard Oil Company v. U. S.,* 78 Ct. Cls. 714, was that the intent of Congress in the enactment of the applicable sections of the Revenue Act of 1926 'was to require a mutual set-off of overpayments and deficiencies and to prevent the allowance of interest to the taxpayer for a period during which he was indebted to the Government.' The inference from that decision, of course, is that it was not intended, on the other hand, to allow the Government interest when it was indebted to the taxpayer."

Here, however, appellee has collected interest, in the sum of $4,161.21, for a period of more than *seven years* during which it was indebted to appellant, and on that same indebtedness it now attempts to avoid interest altogether.

This clear injustice is even more emphasized by the fact that appellant did not deliberately omit payment of that balance of the assessment for 1945. Appellant's funds were exhausted by the installments which he did pay for other years, which installments, although overpayments, were not refunded until December 6, 1955, after remand by this court.

Thus the attempt here to apply section 3771 to a judgment results in an injustice of the most palpable character, and clearly one which the Congress did not intend.

IV.

The Attempt to Apply Section 3771(b)(1) of I. R. C. 1939 Here Is a Collateral Attack Upon the Judgment.

In order to make the question clear, appellant is not contending that the government cannot collect an assessment out of a judgment for refund. To call the procedure used that of "credit" of the judgment against the assessment is wholly academic. A judgment ordering payment of money is property (*United States ex rel. Marcus v. Lloyd Electric Company* (D. C., Pa.), 43 F. Supp. 12; *Mills Organization v. Shawmut Corp.,* 29 Cal. 2d 863; *Pennsylvania Company v. Scott,* 346 Pa. 13, 29 A. 2d 328, 144 A. L. R. 849) so that the government can collect an assessment out of it under the revenue provision for distraint. (I. R. C. 1954, sec. 6331; Treas. Regs., sec. 301.6331-1; Rev. Rul. 89, 1953-1 C. B. 474.)

Since taxes due the United States are debts (*Price v. U. S.,* 269 U. S. 492) the government can also collect a deficiency out of a judgment under the general provision for offset of any debt due the United States against judgments against the United States. (Act of March 3, 1875, now 31 U. S. C., sec. 227; *Aluminum Co. of America v. U. S.* (Ct. Cls., 1940), 30 F. Supp. 686.) In respect to that provision the Supreme Court, in *United States v. Jones,* 119 U. S. 477, 7 S. Ct. 283, stated, at 7 S. Ct. 285:

> "Reference is also made to an act of March 3, 1875, c. 149 (18 St. 481), which provides for 'deducting any debt due the United States from any judgment recovered against the United States by such debtor'; but this gives the accounting officers of the government no authority to re-examine the judgment.

> It only provides a way of payment and satisfaction if the creditor shall, at the time of the presentation of his judgment, be a debtor of the United States for anything except what is included in the judgment, which is conclusive as to everything it embraces."

In the *Aluminum Co.* case the Court of Claims, referring to the Act of March 3, 1875, and section 177(b) of the Judicial Code, now section 2411(a) thereof, allowed the procedure under the Act of March 3, 1875, but computed the interest under the said section 177(b). The Court there stated:

> "The two Acts are not in conflict and wherever applicable must be construed as having concurrent effect."

Nor would the mechanics be any different in the case of offset than in case of a refund actually paid to the taxpayer, except that the check issued by the Treasury Department for the refund would be made, not to the taxpayer, but to the proper division of government, here to the District Director of Internal Revenue. (*Cherry Cotton Mills, Inc. v. United States* (Ct. Cls.), 59 F. Supp. 122, aff'd 327 U. S. 536, 66 S. Ct. 729.)

What is involved here, then, is not the right of the government to collect the assessment out of the judgment. What is involved here is only the determination of interest and the question is whether section 3771(b)(1) of I. R. C. 1939 may be applied in that determination.

That provision applies by its express terms only to a credit. A provision immediately following covers re-

funds. The judgment here, however, says nothing about a credit. On the contrary, it provides expressly for a refund; and a judgment, as stated in *United States v. Jones, supra,* is "conclusive as to everything it embraces." Yet defendant is trying to treat it as if it did not order a refund but did instead order a credit. Such treatment would be a collateral attack upon the judgment. In *Cocke v. Halsey et al.,* 41 U. S. 71, 87, 10 L. Ed. 891, the Supreme Court stated:

> ". . . in every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until it shall be regularly reversed by a superior authority; and cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding. This principle has been too long settled to admit of doubt at this day, and has been repeatedly and expressly recognized in this court, as in the cases of *Thompson v. Tolmie et al.* (2 Peters, 157), *The United States v. Arrendondo* (6 Peters, 720), *Voorhees v. The Bank of the United States* (10 Peters, 473), and *The Philadelphia and Trenton Railroad Company v. Stimpson* (14 Peters, 458)."

Appellant has no complaint here because the government collected an assessment out of the judgment for refund, as it might by distraint or offset. To treat such collection as a credit, however, instead of the refund expressly ordered, so as indirectly to apply a provision for the computation of interest which was never intended for a situation such as this is clearly a collateral attack upon the judgment which established law prohibits.

V.

No Summary Judgment Could Be Entered Here in Favor of Appellee Because the Findings Do Not Conform to the Pleadings and Affidavits Filed and as the Findings Are Framed a Material Issue of Fact Remains.

The allegations in the complaint were all admitted by the answer. The answer alleges no additional facts. The only addition to the facts is appellee's affidavit. Thus there is nothing upon which findings here can be based except the allegations in the complaint and appellee's affidavit.

The findings, however, omit the very material fact that the judgment expressly ordered a *refund.* The findings, in addition, distort the facts shown in the pleadings and the affidavit.

It follows that the summary judgment entered here was improper in any case. (*Sarkes Tarzian, Inc. v. United States* (C. A. 7, Feb. 1957), 240 F. 2d 467; *United States v. Gardner* (C. A. 9, May 1957), 244 F. 2d 952.

Conclusion.

Appellant submits in conclusion that the summary judgment entered was erroneous and that the court below should not have denied to appellant interest as expressly provided under the Judicial Code.

GEORGE T. ALTMAN,

Attorney for Appellant.

APPENDIX.

I. R. C. 1939, section 3771(b)—Interest on Overpayments.

(b) Period.—Such interest shall be allowed and paid as follows:

(1) Credits.—In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921, 42 Stat. 227, or any subsequent Revenue Act, then to the date of the assessment of that amount.

(2) Refunds.—In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

I. R. C. 1939, section 3773—Interest on Judgments.

For interest on judgments, see section 177 of the Judicial Code as amended by act of May 29, 1928, c. 852, sec. 615, 45 Stat. 877 (U. S. C., Title 28, sec. 284).

I. R. C. 1954, section 6612(a)—Cross References.

(a) Interest on Judgments for Overpayments.—For interest on judgments for overpayments, see 28 U. S. C. 2411(a).

JUDICIAL CODE, section 177, as amended by Act of May 29, 1928, c. 852, sec. 615, 45 Stat. 877.

(a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

(b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.

JUDICIAL CODE, section 2411(a), as amended May 24, 1949, c. 139, sec. 119, 63 Stat. 105.

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal

Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.